

82-1926

NO. \_\_\_\_\_

FILED

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ALEXANDER L. STEVENS  
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

DOROTHY O. KOPITUK, RAYMOND C. KOPITUK,  
and OSCAR MORALES,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

JOSE E. MARTINEZ, ESQ.

ENGLISH, McCAUGHAN &  
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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court can recall an alternate juror who has been discharged and released from sequestration to substitute a jury member who became ill after the fifth day of deliberations?

2. Whether the Petitioners were placed in double jeopardy when, due to the illness of a juror, said juror was dismissed by the Court and an alternate juror, who had been discharged and released from sequestration, was recalled and placed on the jury to serve as the twelfth person, mandating the commencement of new deliberations?

## LIST OF INTERESTED PERSONS

The only persons having an interest in this case are the Petitioners and the United States of America.

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Petitioners, DOROTHY O. KOPITUK,  
RAYMOND C. KOPITUK and OSCAR MORALES, re-  
spectfully pray that a Writ of Certiorari  
issue to review the judgment, opinion and  
order on rehearing of the United States Court  
of Appeals for the Eleventh Circuit, entered  
in this proceeding on November 24, 1982 and  
January 14, 1983.

## OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in the Appendix attached hereto. The Court of Appeals denied the petition for rehearing on January 14, 1983. The District Court did render a written opinion specifically directed to this case.

## JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on November 24, 1982. The appellate court denied the petition for rehearing on January 14, 1983. The petition is filed within the authorized time period. Jurisdiction is invoked under 28 U. S. C. §1254(1).

CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED

U. S. Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, or when in actual service in time of War or public danger; nor shall any person be subject for the same offence or be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of his life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.



U. S. Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

FED. R. CRIM. P. 24(c):

The Court may direct that not more than six jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict,

become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.

## STATEMENT OF THE CASE

After seven months of trial, proofs were closed and twelve jurors were ordered sequestered to begin deliberations. Two alternate jurors were also sequestered separate and apart from the twelve trial jurors. After two days of deliberations, the Trial Judge decided to, and did specifically discharge the two alternate jurors and released them from sequestration. (Vol. 102, pp. 22-24).

In discharging the two alternate jurors, the Trial Judge suggested they avoid media coverage in the "slim possibility" they may be called (Vol. 102, p. 23). The two alternate jurors disappeared into the public mainstream with the instruction they do not discuss the case with anyone or leave the State on a vacation until the case had been concluded.

On August 11, 1979, twelve jurors commenced deliberations which were interrupted on August 17, 1979, due to the illness of one of the jurors. On August 21, 1979, the Court discharged the ailing juror and decided to substitute the first alternate juror, Mrs. Evangelista, who had been previously discharged. Mrs. Evangelista had been at large and unsequestered in the general public for a period of thirteen days before she was seated with the original eleven jurors.

The original notes of the first eleven jurors, together with the verdict sheets, were given to the deputy marshall and placed under seal (Vol. 105, pp. 30-31) (Vol. 106, pp. 63-64), although it is not known whether any of the verdict sheets were finalized (indicating whether a verdict had been reached as to one or more of the Defendants).

## REASON FOR GRANTING THE WRIT

1. The opinion of the Eleventh Circuit is in direct contradiction of the Defendant's rights under the Fifth Amendment due process right, and the Sixth Amendment right to a trial by an impartial jury, and rule 24(c) of the Federal Rules of Criminal Procedure, which provides that no alternate juror shall be substituted once the case has been submitted to the jury for deliberation.

The Federal Rules of Criminal Procedure, as promulgated by the Supreme Court, provide for substitution of a juror upon the occurrence of certain events prior to the submission of the case to the jury for deliberation. The relevant section of Rule 24 provides that:

...alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict become or are found to be unable or disqualified to perform their duties...an alternate juror who does not replace

a regular juror shall be discharged after the jury retires to consider its verdict. (our emphasis)

The language of the Rule clearly indicates that no discretion is vested with the lower Court whereby said Court can replace a juror except "prior to the time the jury retires to consider its verdict." In grappling with this issue, the Eleventh Circuit recognizes that placing an alternate juror on the jury once the case has been submitted for deliberations is a violation, not only of the letter, but also of the spirit, of Rule 24(c). Notwithstanding this acknowledgment, the Eleventh Circuit felt bound by the doctrine of stare decisis as this issue had recently been decided by a different panel within the same circuit. As the Court explained:

The decision in Phillips is binding as precedent in this circuit pursuant to the Fifth Circuit Court of Appeals Reorganization Act of 1980, P. L. 96-452, 94 Stat. 1995. Bonner vs. City of Prichard, Alabama, 661 Fed 2d 1206, 1207 (11th, 1981). Extrapolating from that fact, it is

clear that this panel is bound by the Phillips decision because one panel of the Court of Appeals is not permitted to overrule or reconsider the decision of a prior panel. (Cites omitted)

Genuine constitutional concerns are raised when one considers that an opinion based on erroneous reasoning has become the cornerstone of a new body of law which authorizes the substitution of jurors once deliberations have begun. This precedent is in direct contravention with Rule 24(c) of the Federal Rules of Criminal Procedure.

As the Criminal Statutes become more complex and sophisticated, so do the criminal trials. It has become commonplace for trials to span a period of eight to twelve months. It becomes a legitimate consideration of the appellate courts in reviewing the proceedings within the lower tribunal to look at the effects that a reversal with directions to retry a massive,

complex case such as those brought under the RICO Statute has on the American Judicial System. However, the length, expense, complexity and burden to the government should never be used as a ladder to scale down the Defendant's constitutional rights.

## 2. Double Jeopardy.

The substitution of the alternate juror operated to place the Petitioner twice in jeopardy for the same offense in a clear violation of the Fifth Amendment. Petitioners have been prejudiced by the fact that they have run the risk of being tried by more than twelve jurors in violation of the guarantys provided by the Sixth Amendment to the Constitution.

This most basic constitutional requirement that a defendant in a criminal case be tried by no more than twelve jurors was enunciated by this Court in Patton vs.



United States, 281 U. S. 276 (1930).

Whatever unorthodox convolutions occurred, the fact remains that Petitioners had two separate and distinct juries sit in judgment in their case. At the time that the Court recalled the alternate juror who had been discharged and released from sequestration, the original jury had been deliberating for a period of approximately five days. Although the court took precautions to insure that the alternate juror had not been prejudiced since her discharge, these precautions were not enough to avoid the taint to the jury by including the alternate juror. In the Kopituk jury the composition of said jury changed so drastically as to constitute a new and distinct jury. As a result, one of the Petitioners' most basic and fundamental rights, the right to trial by jury, which is guaranteed to all Americans by the Bill of Rights, has been grossly violated.

## CONCLUSION

For the above-stated reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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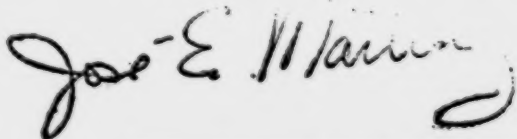
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Counsel for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this <sup>9<sup>th</sup></sup> ~~day~~  
day of <sup>May</sup> ~~April~~, 1983, three copies of the  
Petition for Writ of Certiorari were deli-  
vered by mail to the Solicitor General,  
Department of Justice, Washington, D. C.,  
20530, and by mail to William C. Bryson,  
Attorney, Department of Justice, Wash-  
ington, D. C., 20530, and Stanley  
Marcus, 155 South Miami Avenue, Miami,  
Florida, 33130. I further certify that  
all parties required to be served have been  
served.

A handwritten signature in cursive script, reading "Jose E. Martinez". The signature is written in dark ink and is positioned above the printed name.

JOSE E. MARTINEZ, ESQ.